

From the Desk of Director Marija Pajeska



**Association of Securities & Derivatives Advisers of Australia**

4 October 2017

ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Response to Position and Consultation Paper 6 – ASIC's power to ban senior officials in the financial sector

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to Treasury in respect of Position and Consultation Paper 6 – ASIC's power to ban senior officials in the financial sector.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

ASDAA believes that there is room for improvement in the regulatory framework adopted by ASIC and that it is important to ensure that:

- at all times any regulatory framework adopted by ASIC should be bound by the rules of evidence;
- at all times any decision made by ASIC or any Committee or officer representing ASIC should be subject to the right of appeal; and
- any decisions to ban a person should be considered by ASIC's Financial Services and Credit Panel to ensure that appropriately qualified persons consider whether a person should be banned.

Position 1: Once an administrative banning power is triggered, ASIC should be able to ban a person from performing a specific function, or any function, in a financial services or credit business

We support this position as it will enhance the powers that ASIC currently has with minimal requirements to change the current laws.

However, we are of the view that the following areas are too broad and vague:

- 'performing a specific function in a financial services business, including managing a financial services business' and
- 'performing any function in a financial services business'.

These requirements need to be further defined so as any person that works in the financial services industry or credit industry can understand what the ramifications of their actions are. Furthermore, the requirement should be limited to banning a person from a role (such as those defined in the Corporations Act, ie. 'officer' or 'senior manager') that can, for example, influence the (this list is not exhaustive):

- decisions made by the financial services or credit providers business;
- corporate governance structure implemented by the financial services or credit providers business; or
- risk management or compliance framework adopted by the financial services or credit providers business.

In order to ensure that there is transparency in the process and that any person that is potentially subject to a banning order is given a fair trial such decisions should be referred to the Financial Services and Credit Panel (once formed). This will ensure that members (with industry experience) are forming an opinion as to whether issuing a banning order will achieve the ultimate goal of protecting consumers.

#### Questions

1. Is it appropriate that ASIC's power to ban individuals be broadly cast? If not, how should the power be framed? If limited to a ban from managing financial services business how should the term 'management' be defined?

We are of the view that ASIC's power to ban individuals should not be broadly cast and that its power to ban individuals should be limited to a ban from managing financial services business and/ or credit provider business, whereby 'management' is defined as a role which can be used to influence certain functions and actions (for examples we refer you to the above comments) of the financial services business and/ or credit provider business.

2. Is it appropriate that these expanded powers to ban also apply in respect of credit businesses?

Yes, and where appropriate ASIC should have the power to ban a person from managing a financial services business and a credit provider business where it is in the public interest to ensure that a person banned from managing a financial services business does not transition to managing credit providers business and vice versa.

Position 2: The threshold for the exercise of ASIC's power to ban senior officials in the financial sector should be expanded

We do not completely support this position as it is not currently consistent with the standards that the industry has been built upon and would require some preliminary changes to allow ASIC to adopt and apply these powers appropriately.

'Good fame and character' versus 'Fit and Proper Person'

Currently, when you apply for an AFS Licence the standard used to determine whether a person will be accepted as a Responsible Manager is 'good fame and character'. When you apply for a credit providers licence the standard used to determine whether a person will be accepted as a Responsible Manager is 'fit and proper person'.

In simple terms:

- to be of good fame and character one has to demonstrate that they are able to act fairly and to maintain appropriate standards of conduct;
- to be seen as a fit and proper person one has to demonstrate that they, amongst other things, are of good fame and character, are competent and have not been disqualified from performing the role they are nominated to perform.

We note that the 'fit and proper person' standard is already adopted in the credit providers sector, however in the financial services sector this standard has not been adopted.

We have no objections for ASIC to use the standard 'fit and proper person', however before such standard is adopted changes should be made initially to ensure that there is consistency. Treasury and ASIC should first consider changing the requirements for assessing a person nominated to be a Responsible Manager of an AFS Licensee to be subject to the 'fit and proper person' test as opposed to the 'good fame and character' test. Once these changes are adopted then ASIC should have the power to ban a person in the financial services sector using the 'fit and proper person' test.

Adequately trained

We understand why this requirement would be relevant however fail to see, based on the current framework adopted in the financial services sector, how this would work.

We refer you to the following:

- ASIC website (<http://asic.gov.au/regulatory-resources/financial-services/training-of-financial-product-advisers/>) which states:

'The ASIC Training Register has been placed under review. The register content will be maintained and valid up to 24 September 2012. After that date, you will need to contact individual training providers directly to get information about the courses they provide. The review will enable ASIC to explore options pending final policy positions flowing from Consultation Paper 153 Licensing: Assessment and professional development framework for financial advisers (CP 153) and the Future of Financial Advice reforms.'

- The consultation process which commenced in 2015 regarding 'Lifting the professional ethical and education standards in the financial services'.

The current educational requirements are vague, to say the least, and are not actively monitored by ASIC. This gives rise to the question as to how will ASIC be able to determine whether someone is adequately trained when there is no real defined structure.

Furthermore, if ASIC's power to ban a person is extended to a person that is not subject to the educational requirements defined for a financial adviser or credit representative, then how does ASIC determine what is adequate.

We are of the position that currently the law is not defined in such a way that ASIC or any other body could confidently and with ambiguity state that a person is not adequately trained. The training standards are not appropriately defined to support any such view.

## Questions

3. Should the 'good fame and character' test in Section 920A of the Corporations Act be replaced by a 'fit and proper person' test?

We are of the view that it is appropriate to make these changes conditional on the 'good fame and character' test being replaced by the 'fit and proper person' test across all aspects and requirements of the law and ASIC Regulatory Guides. To judge a person based on a higher standard than what was initially used to approve them can itself be viewed as misleading and deceptive.

4. Should the positions outlined above, so far as they relate to senior officials, adopt the current definitions of 'officer' and 'senior manager' in the Corporations Act? Or should some other definition/s be used?

We agree that ASIC's power to ban senior officials should be limited to 'officer' and 'senior manager' as defined in the Corporations Act.

5. Is it appropriate that ASIC have power to ban individuals involved in phoenixing activity and are the positions outlined above appropriately cast? Should this ground be limited to phoenixing activity within a certain period and should the banning period for phoenixing activity be capped (as it is for director disqualifications under section 206F of the Corporations Act)?

We believe it is important to ensure that there is consistency in the law which would include consistency:

- in the powers granted to ASIC;
- across the Corporations Act; and
- across the National Consumer Credit Act.

We are of the view that ASIC should have the power to ban individuals involved in phoenixing activity and such power should replicate the power that ASIC has to disqualify a person from managing a corporation under Section 206F of the Corporations Act (including the time frames defined in this section).

6. Should ASIC be able to impose a ban based on a breach by an individual of a duty under sections 181, 182 or 183 of the Corporations Act? What would be the implications of allowing ASIC to ban based on a breach of section 180?

ASIC's power to disqualify a person from managing corporations is set out in Part 2D.6 of the Corporations Act (specifically, Section 206F of the Corporations Act). To give ASIC the ability to impose a ban based on a breach by an individual of a duty under Sections 180, 181, 182 or 183 of the Corporations Act appears to be redundant when they already have that power.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email [brad@asdaa.com.au](mailto:brad@asdaa.com.au).

Yours Sincerely

Marija Pajeska  
Compliance Director